IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

DAVID SKUNDOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:02-0205**
	)	
MICHAEL COLEMAN, formerly Acting Warden, Mount Olive Correctional Complex, in his official and personal capacities, THOMAS McBRIDE, Warden, Mount Olive Correctional Complex, in his official capacity, and ROBERT DANIEL, in his personal capacity,	)	
	)	
Defendants.	)	

PROPOSED FINDINGS AND RECOMMENDATION

Pending are the following matters: (1) Plaintiff's Motion to Dismiss the Complaint against Defendant Michael Coleman (Document No. 37.); (2) Motion of Thomas McBride and Robert Daniel to Deny Class Certification (Document No. 38.); (3) Plaintiff's Motion for Judgment on the Pleadings (Document No. 41.); and (4) Defendants' Motion for Summary Judgment (Document No. 43.). The undersigned has concluded and hereby recommends that the District Court **GRANT** Plaintiff's Motion to Dismiss the Complaint against Defendant Michael Coleman and the Motion of Thomas McBride and Robert Daniel to Deny Class Certification, **DENY** Plaintiff's Motion for Judgment on the Pleadings and **GRANT** Defendants' Motion for Summary Judgment.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiff an inmate designated for misconduct to the Quilliams II Segregation Unit at Mount Olive Correctional Complex [MOCC], acting *pro se*, filed his Complaint in this matter on March

8, 2002, seeking to initiate a class action alleging violations of constitutional and civil rights under 42 U.S.C. § 1983.[1] (Document No. 2.) Thus, obviously complaining of alleged constitutional and civil rights violations occurring prior to March 8, 2002, he named as Plaintiffs himself and "the class of similarly situated persons being all prisoners housed in the Quilliams I and II Units at the Mount Olive Correctional Complex." He stated that the class consisted of approximately 238 prisoners. Id., ¶ 4. He named Michael Coleman, then acting Warden of Mount Olive Correctional Complex [MOCC] as Defendant. Plaintiff stated that he "is permitted one (1) hour of daily out-of-cell recreation five (5) times per week with a group of segregated prisoners." Id., ¶ 20. Plaintiff alleged that before a group of segregated inmates enter the recreation yard, prison officials search the yard for contraband and they observe the group of inmates while they are engaging in recreation. Id., ¶¶ 21 and 22. Plaintiff stated that he is subject to a visual body cavity search, also known as a VBC or strip search, each time he goes to and returns from the Quilliams II recreational yard which he describes as a large room "one wall of which is open to the elements and covered with chain link fencing . . .." Id., ¶ 18.[2] He complained that "when it is cold, Plaintiff . . . experiences physical pain

[1] Because Plaintiff is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer, and therefore they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

[2] Plaintiff testified at his deposition on December 12, 2002, that for the approximately 3½ year period while he was in Quilliams before the end of March, 2002, when he filed this action, he took recreation many times but only went to recreation once thereafter. (Document No. 44, Exhibit A, pp. 7 - 8.) Plaintiff stated in his Declaration attached to his Response to Defendants' Motion for Summary Judgment that "I do not take recreation because it is profoundly humiliating to perform naked the dance-like movements of a VBC search . . .." Document No. 48, Exhibit 1, ¶ 20.)

from standing naked in the cold air." Id., ¶ 24.[3] He further complained that during the visual body cavity searches, he is observed by other prisoners, correctional officers and female prison staff. Id., ¶ 26. He stated two claims for relief at ¶¶ 28 and 29 as follows:

> Defendant Warden Coleman's policy of performing routine VBC searches on the Rec Yard in the presence of persons not required for conducting the searches, including members of the opposite sex, is not reasonably related to penological concerns and is in contravention of the Fourth Amendment of the U.S. Constitution.
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> Defendant Warden Coleman's policy of performing routine VBC searches on the Rec Yard in cold weather is not reasonably related to penological concerns and is in contravention of the Fourth Amendment of the U.S. Constitution.

Plaintiff requested a declaratory judgment asking the Court to declare Defendant's policies unconstitutional, an injunction against further visual body cavity searches on the recreation yard, nominal damages, costs and attorney's fees.

Plaintiff attached to his Complaint documents relating to efforts he made to exhaust administrative remedies. Exhibit A is a G-1 Grievance Form dated November 6, 2000, indicating Plaintiff's complaints about visual body cavity searches "(1) in front of other prisoners [and] in . . . a visibly accessible area; (2) outdoors."[4] Exhibit B is a G-2 Grievance Form dated November 7, 2000, in which Plaintiff reiterates his complaints stating that he is "questioning the need for visual body cavity searches in the place where they are conducted * * * in front of other prisoners and

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[3] Plaintiff testified at his deposition on December 12, 2002, that during cold weather, inmates can wear their insulated coats and "little work gloves" to recreation. He further stated that the strip search process takes approximately three minutes including the time spent undressing and dressing and that the time period when he is nude is "[a]bout a minute. Well, about 30 seconds. I suppose 30, 40 seconds." Plaintiff acknowledged that he has sustained no injuries as a result of being nude during the strip search process for between thirty seconds and a minute in cold weather. (Document No. 44, Exhibit A, pp. 9 - 10, 20 - 21.)

[4] Plaintiff directed his G-1 Grievance Form to Lt. Robert Daniel as a Unit Manager/Staff Supervisor of Quilliams II and Mr. Daniel wrote the response to Plaintiff's Grievance.

passersby." Exhibit C is the MOCC reply dated November 16, 2000. The MOCC Warden at the time, Mr. Painter, replied that "inmate searches . . . will be carried out in accordance with set policy and procedure. Every effort is made to afford each inmate with as much privacy as is possible in regard to strip searches." Exhibit D is Plaintiff's Memorandum to Commissioner Kirby of the West Virginia Department of Corrections dated November 21, 2000, regarding his grievance appeal. Exhibit E is a Memorandum to Plaintiff from Leslie Tyree, General Counsel to the West Virginia Division of Corrections, dated November 28, 2000, adopting Warden Painter's response to Plaintiff's G-2 Grievance Form and notifying Plaintiff that "you are free to seek redress of your grievance through an appropriate civil court."

On October 23, 2002, the Court ordered Defendant to submit an Answer to Plaintiff's Complaint within twenty days of receipt of the Court's Order. (Document No. 15.) On November 13, 2002, Defendant Coleman filed his Answer to Plaintiff's Complaint denying all allegations of conduct infringing upon Plaintiff's constitutional rights. (Document No. 17.) Mr. Coleman disputed Plaintiff's entitlement to proceed in behalf of a class of Plaintiffs citing the Fourth Circuit's decision in Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975).[5] He further raised numerous defenses affirmatively including Plaintiff's failure to exhaust administrative remedies, statute of limitations

[5] It is clear under this authority that the Motion of Thomas McBride and Robert Daniel to Deny Class Certification (Document No. 38.) must be granted. Class actions are appropriate under 42 U.S.C. § 1983. *Kirby v. Blackledge*, 530 F.2d 583, 588 (4th Cir. 1976). Class actions are not appropriate, however, when a plaintiff is acting *pro se*. Reviewing the District Court's rulings upon an inmate's claims brought in behalf of himself and other inmates in *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) and rejecting his attempt to proceed in behalf of other inmates, the Fourth Circuit pointed out that "[a] judgment against him may prevent the other inmates from later raising the same claims." The Court reasoned that "we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others." *Id.*

and immunity.

As the record reflects, having leave of Court (Document No. 21.), counsel for the Defendant deposed Plaintiff on December 12, 2002. (Document No. 44, Exhibit A.) On December 19, 2002, Plaintiff filed a Motion for Leave to File Amended Complaint attaching a copy of his proposed Amended Complaint to his Motion. (Document No. 29.) In his Amended Complaint, Plaintiff named as Defendants Thomas McBride in his official capacity as Warden of MOCC and Robert Daniel, the Quilliams II Unit Commander who, Plaintiff claims, participated in a VBC search of him on February 25, 2002.[6] (Document No. 29, Amended Complaint, ¶ 10.) Plaintiff did not include Mr. Coleman as a Defendant in the style of the case and stated no allegations against Mr. Coleman in his Amended Complaint. Plaintiff raised the same allegations respecting visual body cavity searches in cold weather and in view of other prisoners, correctional officers and female prison staff. Id., ¶¶ 24 and 26. Stating additional facts pertinent to his accusations against Mr. McBride and Mr. Daniel, Plaintiff proposed to amend his Complaint to claim that the MOCC official policy of conducting VBC searches as alleged in his Complaint to violate the Fourth Amendment also violated the Eighth Amendment of the United States Constitution. Id., ¶¶ 28 and 29. He added the following claim for relief at ¶ 30:

> The MOCC official policy of conducting routine VBC searches on the Rec Yard in cold weather constitutes cruel and unusual punishment in contravention of the Eighth Amendment of the U.S. Constitution.

He further changed his request for relief to include, in addition to declaratory and injunctive relief as requested in his Complaint, the assessment of judgment against and damages from Mr. McBride

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[6] Defendants admitted in answering Plaintiff's Amended Complaint that Mr. Daniel participated in strip searches of inmates but could not admit or deny that he participated in a strip search of Plaintiff on February 25, 2002. (Document No. 39, ¶ 10.)

and Mr. Daniel.

On January 2, 2003, the Court granted Plaintiff's Motion to Amend his Complaint. (Document No. 32.)[7] On January 8, 2003, Mr. Coleman filed his Amended Answer to Plaintiff's Amended Complaint again claiming that Plaintiff could not proceed with the case in behalf of a class of inmates, denying all allegations of conduct infringing upon Plaintiff's constitutional rights and raising numerous affirmative defenses. (Document No. 36.) Likewise, on January 9, 2003, Mr. McBride and Mr. Daniel filed their Answer to the Amended Complaint and a Motion to Deny Class Certification. (Document Nos. 38 and 39.) The Defendants attached as Exhibits to their Answers Post Orders evidencing the MOCC policy respecting escorting Quilliams inmates[8], strip searching inmates[9] and inmate recreation.[10] Referring to these documents, Defendants admitted that male

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[7] The Court noted in its Order that this is not the first time claims of this nature have been raised. (Document No. 32, fn. 2.) In *Blevins v. Trent, et al.*, 5:96-0107, Mr. Kenneth Blevins, an inmate in a punitive segregation unit at MOCC, contended that he was strip searched in front of male and female officers as he was transferred between the pod and the "weather room" or exercise area. The Defendants stipulated that inmates were strip searched in front of women. In Findings on Selected Issues and Recommendation, United States Magistrate Judge Stanley determined that this violated Mr. Blevins' constitutional right of privacy. Magistrate Judge Stanley's conclusion was neither adopted nor rejected by the District Court. It appears that the case was settled after Magistrate Judge Stanley entered her Findings and Recommendation and before objections were filed.

[8] MOCC's Post Order regarding escorting Quilliams I and II control unit inmates dated August 1, 2002, less than a month after Plaintiff filed his Complaint in this case, and endorsed by Warden McBride, Exhibit 1, provides that "[a] minimum of two (2) officers is required to escort a Control Unit status inmate . . .." and "Correctional Officers assigned to escort Control Unit inmates are responsible for ensuring that a proper strip search has been conducted on each inmate prior to being escorted."

[9] MOCC's Post Order regarding strip searching inmates dated August 2, 2002, and endorsed by Warden McBride, Exhibit 2, provides that "[o]nly trained male Correctional Staff will conduct strip searches, unless a state of emergency is in place and there are no male staff members are available."It specifies in detail the manner in which strip searches are required to be conducted stating that correctional staff members must "[h]ave the inmate move to an area that

correctional officers strip search Plaintiff when he is moved from and returned to his cell. (Document Nos. 36 and 39, ¶¶ 13, 15 and 16.) They further admitted that inmates are strip searched when they leave the recreation yard "within a wire mesh 'cage' which physically separates the inmates being strip searched from the inmates on the recreation yard." Id., ¶ 23. They admit that inmates are strip searched following recreation even if they take recreation by themselves. Id., ¶ 17. They also admit that "during strip searches prior to exiting the recreation yard, the plaintiff can be observed by (a): inmates on the recreation yard and (b) any correctional officer conducting the strip search." (Document No. 39, ¶ 26.) They admit that "an officer searches the recreation yard for contraband prior to prisoners entering the recreation area. (Document Nos. 36 and 39, ¶ 21.) They admit that they can observe the recreation yard while inmates are in recreation, but they "deny that officers have the ability to monitor the entire recreation area in a fashion that guarantees that no inmate possesses or obtains weapons or contraband while in contact with other inmates in the recreation area." They further note that "[t]he recreation area is the only area when inmates can have direct contact with each other and, hence, pass weapons or other contraband which is not found in the initial search of inmates." Id., ¶ 22. They specifically deny that strip searching "unreasonably exposes" Plaintiff to observation by female prison staff. Id. They deny for want of information Plaintiff's allegation that he experienced physical pain when strip searched in cold weather. (Document Nos. 36 and 39, ¶

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will protect his privacy as much as is reasonably possible."

[10] MOCC's Post Order regarding inmate recreation for Quilliams I and II control unit inmates dated August 1, 2002, and endorsed by Warden McBride, provided that "[i]nmates will be strip searched prior to being allowed exit from their cells." It further provides that "[a]t the end of recreation time inmates will be strip-searched, secured and returned to their cells in groups of two until all inmates participating in recreation activities have been processed back to their cells."

24.)[11]

On January 9, 2003, Plaintiff filed a Motion to Dismiss his Complaint against Mr. Coleman on grounds that he stated no claims against Mr. Coleman in his Amended Complaint. (Document No. 37.)

On January 22, 2003, Plaintiff filed a Motion for Judgment on the Pleadings. (Document No. 41.) Plaintiff claims that, based upon facts alleged and admitted in the pleadings, he is entitled to "a declaratory judgment stating that VBC's on the Quilliams Rec Yard, when a prisoner has had solitary recreation, violates the Fourth and the Eighth Amendments . . .." On January 27, 2003, Defendants McBride and Daniel filed a Response to Plaintiff's Motion for Judgment on the Pleadings. (Document No. 45.) Defendants claim that judgment on the pleadings is not appropriate because they did not admit that they violated Plaintiff's privacy rights and contend that they have raised cognizable defenses to Plaintiff's claims, namely, Plaintiff's failure to exhaust administrative remedies, his failure to file this action within the time allotted under the applicable statute of limitations and their entitlement to qualified immunity.

Defendants also filed a Motion for Summary Judgment and Memorandum in Support on January 27, 2003. (Document Nos. 43 and 44.) In their Memorandum, Defendants first point out that Plaintiff has been designated to the Quilliams II Segregation Unit due to his violent misconduct, assaulting another inmate with a homemade knife and fighting, when in general population.

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[11] Because the Post Orders attached to Defendants' Answers are dated after Plaintiff filed his Complaint in this case, the undersigned does not consider them evidence of MOCC's practices and policies with respect to their stated topics before Plaintiff filed his Complaint. Those practices and policies are evident, however, from the allegations and admissions of the parties as detailed herein and are consistent with the Post Orders as they came to be adopted after Plaintiff filed his Complaint.

(Document No. 44, pp. 1 and 2.) They state that "Quilliams II is a segregation unit which houses the most dangerous of inmates at the Mount Olive Correctional Complex." They state further that "[d]ue to the very dangerous nature of the inmates housed on this unit, great precaution must be exercised to avoid injury to staff and other inmates." Id., p. 2. Defendants state that indeed weapons have been found within the Quilliams II Unit and on the recreation yard attaching a picture of them as an Exhibit. They claim therefore that "[t]he strip search is essential to prevent inmates from assaulting staff with weapons which they may have obtained or assembled while on the yard. It is essential to remember that despite the initial strip search in cells, inmates are able to get weapons on to this yard, as weapons have been found there. Therefore, without the additional strip search, staff are exposed to the potential of being assaulted by an inmate who has either obtained or assembled a weapon while on the recreation yard." Id., p. 3, references to Exhibits omitted. Respecting the manner in which strip searches are conducted, Defendants state as follows:

> The strip search is conducted by two male correctional officers who position themselves in front of the inmate. The physical construction of the search area and the location of the officers provide the inmates a high degree of privacy. Because the searches are always conducted by male staff any viewing by female staff would be purely incidental and *de minimis*.

Id., p. 4, references to Exhibits omitted. Defendants state further that

> viewing of a strip search is all but impossible unless an officer directly participates in the search. Anyone not participating in the search simply can and is expected to go in a different direction and avoid the area. Privacy screening, however, is not an option because it would unduly obstruct the view of the recreation yard. . . . [A]ny privacy screening would create dangerous blind spots that would prevent staff (even standing directly in front of the windows) from observing assaults and inmate movement. The risk to inmate safety and staff would be unreasonably increased.

Id., references to Exhibits omitted. Defendants point out that Plaintiff could cite "no specific instance

where he was observed by female staff."[12] Id.

Defendants state the following grounds for summary judgment:

1. Plaintiff's failure to fully exhaust administrative remedies;

2. Plaintiff's claims are barred by operation of the applicable statute of limitations;

3. The doctrine of *respondeat superior* has no application in a case of this nature;

4. Defendants are entitled to qualified immunity;

5. Plaintiff's Eighth Amendment claim fails because he has not suffered the sort of personal discomfort or injury necessary to support such a claim;

6. Plaintiff has failed to demonstrate a violation of his right of privacy;

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[12] Plaintiff acknowledged that females do not conduct strip searches and testified further as follows respecting incidental observations of strip searches by female staff at his deposition:

> Q. Would there be females that would be incidentally passing by or –
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> A. There might be a female working the tower or there might be females – the mail staff – the people who pick up the mail, the medical staff. There are a lot of females who happen to be walking by that can observe the search.
>
> Q. Have any of these female staff stopped and specifically observed the searches, or have they gone on about their business?
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> A. Sometimes they stop.
>
> Q. Do you know of any – can you recall any specific instance?
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> A. I personally haven't observed it.

(Document No. 44, Exhibit A, pp. 19 - 20.) Plaintiff stated in his Declaration attached to his Response to Defendants' Motion for Summary Judgment that "I am unable to identify any occurrence when a female has observed me while I was naked on the QII Rec Yard because when a female is in a position to observe me I do not observe her." He stated further that "[m]eeting the gaze of a female would be profoundly humiliating while I performed naked the dance-like movements of a VBC search . . .." (Document No. 48, Exhibit 1, ¶¶ 22 - 23.)

7. Plaintiff's claims fail because he cannot show adequate physical injury; and

8. Plaintiff is not entitled to prospective relief.

Defendants claim that Plaintiff's failure to exhaust administrative remedies "occurs with respect to the issues asserted and the defendants sued." Id., p. 10. Specifically, they claim that in filing grievance forms, Plaintiff did not "provide . . . an opportunity to address female staff purported viewing strip searches." Id. They attach Warden McBride's Declaration, Exhibit B, indicating that Plaintiff "presented certain concerns to another individual, more than two years prior to his attempt to bring me into this litigation as a party." Warden McBride states that "as a prison official, I do not waive my right to insist on first being given an opportunity to first administratively address the allegations in the Amended Complaint." Second, they claim that the statute of limitations bars Plaintiff's action against Warden McBride and Officer Daniel because they did not become Defendants until Plaintiff amended his Complaint and his Complaint was deemed filed in January, 2003. Defendants point out that Plaintiff's grievances, copies of which he attached to his Complaint and Amended Complaint relate to matters which occurred more than two years before he named Warden McBride and Officer Daniel as Defendants. Id., p. 11. Third, asserting that the doctrine of *respondeat superior* is generally not applicable in § 1983 cases, Defendants claim that no circumstances are presented in this case whereby Defendants, who were serving in administrative and supervisory positions at all times relevant, can be deemed liable. Fourth, Defendants contend that they are immune from liability because Plaintiff cannot prove that their conduct violated his constitutional rights. They state that Plaintiff "has suffered from no physical injury, is at most discomforted by the strip search and could point to no specific incident of being observed by female staff while undressing. Moreover there is no privacy violation present." Id., p. 14. Fifth, Defendants

claim Plaintiff's Eighth Amendment claim fails because he has not proven and cannot prove that he has "suffered an objective deprivation of a basic human need." Id., p. 15. Sixth, Defendants claim that Plaintiff can not prove a violation of his right of privacy. An analysis pursuant to the four factor test stated in Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987), they contend, yields the conclusion that "if . . . there is an infringement of inmate Skundor's right of privacy, it was incidental, *de minimis* and reasonably related to a legitimate penological interest." Id., p. 20. Seventh, Defendants claim that Plaintiff's request for monetary damages is barred under 42 U.S.C. § 1997e(e) because he has admitted that he has suffered no physical injury. Id. Finally, Defendants claim that Plaintiff is not entitled to prospective relief because it is not evident that Plaintiff has sustained or is likely to sustain any deprivation of his asserted constitutional rights. Id., pp. 22 -23.

Plaintiff filed a Response to Defendants' Motion for Summary Judgment on February 21, 2003. (Document No. 48.) Plaintiff attacks Warden McBride's and Mr. Daniel's claims of entitlement to summary judgment on grounds that he failed to exhaust administrative remedies and sought to name them as parties after the running of the statute of limitations. Id., pp. 4 - 11. Plaintiff then addresses Defendants' assertion that Plaintiff cannot prove a violation of his Fourth Amendment right of privacy. Id., pp. 11 - 28. Finally, Plaintiff contends that he has established an Eighth Amendment claim. Id., pp. 28 - 34. Through an analysis utilizing the four factor test specified by the Supreme Court in Turner v. Safley, 482 U.S. 78, 78 - 79, 107 S.Ct. 2254, 2256, 96 L.Ed.2d 64 (1987), Plaintiff reaches the same conclusion with respect to both his Fourth and Eighth Amendment claims:

> In sum, conducting VBC searches on the Rec Yard is not reasonably related to legitimate penological interests because: the asserted reason for the searches is clearly a sham[13] . . .; Plaintiff must forego his only out-of -cell time to maintain his Fourth and Eighth Amendment rights . . .; accommodating Plaintiff's rights actually reduces the strain on prison resources . . .; and in-cell VBC searches are an obvious, easy alternative to Rec Yard searches . . .."

Id., p. 19 (Citations to pages in Plaintiff's Response omitted; footnote added.). Defendants made no Reply to Plaintiff's Response to their Motion for Summary Judgment.

THE STANDARDS

Motion for Judgment on the Pleadings

> Rule 12(c) of the Federal Rules of Civil Procedure provides as follows:
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> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Motions for judgment on the pleadings are subject to the same standard as Rule 12(b)(6) motions to dismiss. Viewing all of the facts in a light most favorable to the non-moving party, the District Court may only grant the motion if it is beyond doubt that the non-movant can plead no facts that would support his claim for relief. Unless the circumstances permit consideration of the motion as a motion for summary judgment, the Court is limited to considering the pleadings taking all

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[13] Plaintiff contends that Defendants' asserted reason for conducting the recreation yard strip searches, namely to prevent the passage of contraband and particularly weapons between inmates as they gather on the recreation yard, is a sham. (Document No. 48, pp. 13 and 16.) His reasons for stating this are conjectural. For example, he states that "a prisoner who intends to wield a smuggled weapon against prison staff is logically most likely to do so on the way to the Rec Yard for fear that the successfully smuggled weapon will be discovered during the Rec Yard VBC search." *Id.*, p. 14. He further indicates that the asserted reason in conducting strip searches on the recreation yard is inconsistent with risk taken in other respects. *Id.*, p. 15.

uncontested allegations as true. The Court may also consider documents attached to and made part of the pleadings by reference as allowed by Rule 10(c) of the Federal Rules of Civil Procedure and judicial notice of matters of public record. *See* United States v. Wood, 925 F.2d 1580, 1581 (7th Cir. 1991).[14]

Summary Judgment

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Once the moving party demonstrates the lack of evidence to support the non-moving party's claims, the non-moving party must go beyond the pleadings and make a sufficient showing of facts presenting a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 - 87, 106 S.Ct.1348, 89 L.Ed.2d 538 (1986). All inferences must be drawn from the underlying facts in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. Summary judgment is required when a party fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual issues proving other elements of the claim. Celotex, 477 U.S. at 322 - 23, 106 S.Ct. at 2552 - 53. Generally speaking, therefore, summary judgment will be granted unless a reasonable jury could return a verdict for the non-moving party on the evidence presented. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 - 48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Generally speaking, to prevail upon a claim under 42 U.S.C. § 1983, Plaintiffs must prove

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[14] The Fourth Circuit cited and relied upon *Wood* in *Armbruster Products, Inc. v. Wilson*, 35 F.3d 555, 1994 WL 489983 (4th Cir.(N.C.))(unpublished)

that (1) a person acting under color of State law (2) committed an act which deprived them of an alleged right, privilege or immunity protected by the Constitution or laws of the United States. Constitutional issues raised by inmates present mixed questions of law and fact. Plaintiff bears the burden of establishing that challenged policies or practices of persons acting under color of State law have limited or restricted him in or deprived him of his constitutional rights. If no facts or inferences which can be drawn from the circumstances will support Plaintiff's claims, summary judgment is appropriate.

DISCUSSION

A. Exhaustion of Administrative Remedies

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)(1996), requires that inmates exhaust available administrative remedies prior to filing civil actions though the administrative process may not afford them the relief they might obtain through civil proceedings.[15] *See* Booth v. Churner, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001)("Under 42 U.S.C. § 1997e(a), an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief."); Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 922, 152 L.Ed.2d 12 (2002)(The Prison Litigation Reform Act's exhaustion requirement applies to all inmate suits about prison life whether they involve general circumstances or particular episodes and whether they allege excessive force or some other wrong.). The statute suggests that exhaustion of administrative

[15] 42 U.S.C. § 1997e(a) provides as follows:

> No action shall be brought with respect to prison conditions under section 1983 of this title or any other federal law, by a prisoner confined in any jail, prison, or other correction facility until such administrative remedies as are available are exhausted.

remedies is a prerequisite to the Court's jurisdiction, but Circuit Courts have held that administrative exhaustion is not a jurisdictional requirement. *See* Rumbles v. Hill, 183 F.3d 1064, 1067 - 68 (9th Cir. 1999); Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 536 - 37 (7th Cir. 1999); Underwood v. Wilson, 151 F.3d 292, 294 (5th Cir. 1998), *cert. denied*, 522 U.S. 906, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); Wright v. Morris, 111 F.3d 414, 421(6th Cir.), *cert. denied*, 522 U.S. 906, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997). At least one District Court in the Fourth Circuit has followed suit. Citing Underwood, *supra*, Judge Kiser noted in Johnson v. True, 125 F.Supp.2d 186, 188 (W.D.Va 2000), that "§ 1997e(a) has not been found by the courts of this circuit to impose exhaustion of administrative remedies as a prerequisite to jurisdiction. Thus, the fact that there are claims within the complaint that may not have been exhausted does not deprive this court of subject matter jurisdiction to rule on such claims." The majority of the Circuits have held in the context of inmates' suits under § 1983 that the failure to exhaust administrative remedies is an affirmative defense under Rule 8(c)[16] of the Federal Rules of Civil Procedure like the defense of statute of limitations. Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C. Cir. 2001); Casanova v. Dubois, 304 F.3d 75, 77 at fn. 3 (1st Cir. 2002); Snider v. Melindez, 199 F.3d 108, 111 - 12 (2d Cir. 1999); Jenkins v. Haubert 179 F.3d 19, (2d Cir. 1999); Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002); Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998)(in dicta); Massey v. Wheeler, 221 F.3d

[16] Listing certain traditionally recognized defenses, Rule 8(c) of the Federal Rules of Civil Procedure provides as follows:

> **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting and avoidance or affirmative defense.

1030, 1034 (7th Cir. 2000); Massey v. Helman, 196 F.3d 727, 734 - 35 (7th Cir. 2000); Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 536 (7th Cir. 1999); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001); Wyatt v. Terhune, 280 F.3d 1238, 1245 (9th Cir. 2002); *cf.* Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir 2000)(An inmate must "plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.")

The undersigned finds that Plaintiff exhausted administrative remedies with respect to the claims he raises in this action. Though Plaintiff did not state specifically in the administrative grievance process that he was complaining that he was or could be observed by female staff members during the recreation yard strip searches, he nevertheless complained of visual body cavity searches there "(1) in front of other prisoners [and] in . . . a visibly accessible area; (2) outdoors." and "in front of other prisoners and passersby." It is clear from responses to Plaintiff's grievances that MOCC staff understood that Plaintiff was complaining that the recreation yard strip searches violated his right of privacy. The undersigned finds from Plaintiffs' general statements in his Grievance Forms that he adequately complained that the recreation yard strip searches violated his privacy interest insofar as they could be observed by "other prisoners and passersby." The Defendants could reasonably have assumed that Plaintiff meant male and female MOCC staff.

Plaintiff filed G-1 and G-2 Grievance Forms and appealed to the Commissioner of the West Virginia Division of Corrections. He received responses from Mr. Daniel, Unit Commander of Quilliams II, then Warden Painter and Leslie Tyree, General Counsel to the Division of

Corrections.[17] Plaintiff's compliance with the administrative scheme for grievances at MOCC has been substantial. Indeed, upon consideration of Plaintiff's appeal and affirming of Warden Painter's response to Plaintiff's G-2 Grievance Form, Ms. Tyree, notified Plaintiff that "you are free to seek redress of your grievance through an appropriate civil court." For these reasons, the undersigned finds the Defendants' assertion that Plaintiff failed to exhaust administrative remedies without merit.

B. Statute of Limitations

In Wilson v. Garcia, 471 U.S. 261, 280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that the statutes of limitations for § 1983 actions are borrowed from State law but characterization of § 1983 actions to determine the most analogous State statute of limitations is a question of federal law. The Wilson Court determined that the proper limitations period for a § 1983 action is the limitations period for personal injury actions in the State where the § 1983 claim arises. West Virginia applies a two-year statute of limitations to personal injury claims. *See* W. Va. Code § 55-2-12(b).

Rule 15(c) of the Federal Rules of Civil Procedure specifies disjunctively three circumstances when an amendment of a pleading relates back to the date of the original pleading as follows:

> An amendment of a pleading relates back to the date of the original pleading when
>
> > (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

[17] Defendants claim that they did not have an opportunity to address Plaintiff's allegations that recreation yard strip searches were observed by female MOCC staff. The undersigned finds their claim implausible in view of the grievance process in place at MOCC. There is no requirement that a party to § 1983 inmate litigation have an opportunity to respond in an administrative process to the allegations contained in the Complaint. Rather, administrative staff are designated to respond to inmate grievances. As it happens in this case, by virtue of their supervisory positions, Mr. Daniel actually responded to Plaintiff's G-1 Grievance Form, and Warden Painter, Warden McBride's predecessor, responded to Plaintiff's G-2 Grievance Form.

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
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> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

See Eakins v. Reed, 710 F.2d 184, 187 - 88 (4th Cir. 1983). Relation back is clearly allowed in consideration of the applicable statute of limitations in this case. *See* Maxwell v. Eastern Associated Coal Corporation, Inc., 183 W.Va. 70, 394 S.E.2d 54 (1990).

Plaintiff filed his Complaint on March 8, 2002, alleging circumstances in violation of his constitutional rights which were the subject of his administrative grievances initiated on November 6, 2000. His Complaint was therefore filed timely. On December 19, 2002, more than two years after the circumstances which were the subject of his grievances, Plaintiff filed his Motion to Amend his Complaint stating essentially the same facts and circumstances as he stated initially in his Complaint and naming Warden McBride and Mr. Daniel. The Court granted his Motion to Amend on January 2, 2003. In view of Plaintiff's Motion to Dismiss his Complaint against Mr. Coleman, who was acting Warden before Mr. McBride became Warden, it is clear that Plaintiff intended in amending his Complaint to substitute Warden McBride for Mr. Coleman. Under these circumstances, the undersigned finds that Plaintiff has properly named Warden McBride, currently the Warden of MOCC, and moved to dismiss his Complaint against Mr. Coleman. Additionally, the undersigned finds that Plaintiff's claims against Mr. Daniel contained in his Amended Complaint should be

permitted to relate back to the time he filed his Complaint. Mr. Daniel, having responded to Plaintiff's G-1 Grievance Form, clearly had notice of Plaintiff's administrative grievances and therefore knew that the circumstances which were the subject of Plaintiff's grievances might be the basis for a lawsuit and that he might be a party to it. For these reasons, the undersigned finds the Defendants' claim of entitlement to dismissal of this suit by operation of the applicable statute of limitations without merit.

C. Qualified Immunity

A State officer is entitled to qualified immunity if his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The qualified immunity standard involves two considerations: (1) whether the law governing the official's conduct was clearly established and (2) in view of that law, whether a reasonable officer could have believed that his conduct was lawful. Where the law is clearly established, the immunity defense ordinarily should fail because a reasonably competent officer should know the law governing his conduct. Harlow, supra, 457 U.S. at 818 - 19, 102 S.Ct. at 2738 - 39. A person deprives another of a constitutional right in violation of § 1983 if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do which causes the deprivation about which the Plaintiff complains. Defendants are entitled to qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The Fourth Circuit follows a two-step sequential analysis for determining the validity of a qualified immunity defense: (1) the

Court must determine whether the facts viewed in the light most favorable to the Plaintiff establish a deprivation of an actual constitutional right; and, if so, (2) the Court then proceeds to consider whether that right was clearly established at the time of the purported violation. Leverette v. Bell, 247 F.3d 160, 166 (4th Cir. 2001), *cert. denied*, 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001)(Reversing District Court's determination that Associate Warden Bell, who strip searched an employee of a South Carolina correctional institution upon suspicion that the employee was bringing contraband into the institution, did not have qualified immunity on grounds that no constitutional violation occurred.)

In considering whether the facts viewed in the light most favorable to the Plaintiff establish a deprivation of an actual constitutional right, the undersigned looks first to the constitutional rights asserted by the Plaintiff and cases discussing them in the context of facts and circumstances as similar as possible to those alleged by Plaintiff. Plaintiff asserts that recreation yard strip searches in the view of other inmates, correctional officers and female prison staff violate his Fourth and Eighth Amendment rights. He further contends that strip searches in the recreation yard in cold weather are in violation of his Eighth Amendment rights.

Inmates clearly retain certain constitutional protections notwithstanding their convictions and confinement in prison. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3198, 82 L.Ed.2d 393 (1984); Bell v. Wolfish, 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979). "[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates." Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987).

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures, shall not be violated . . .." In Bell v. Wolfish, *supra*, 441 U.S. at 560, 99 S.Ct. at 1885, the Supreme Court found a prison's procedure of conducting visual body cavity searches on pre-trial detainees after contact visits with persons from outside the prison constitutional. Visual body cavity searches do not violate the Fourth Amendment and prison officers may conduct them without probable cause if the searches are reasonable and not motivated by punitive intent. Bell v. Wolfish, 441 U.S. at 545 - 46 and 558 - 61, 99 S.Ct. at 1877 - 78 and 1884 - 86. Reasonableness is determined by balancing "the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id., 441 U.S. at 599, 99 S.Ct. at 1884.[18] Weighing the interests of society in the security of its penal institutions against the interests of inmates in privacy within their cells, the Supreme Court stated in Hudson, *supra*, 468 U.S. at 527, 104 S.Ct. at 3201, that "[w]e strike the balance in favor of institutional security." The Hudson Court considered the responsibilities of prison administrators stating as follows:

> [P]rison administrators are to take steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one or the most perplexing problems of prisons today; they must prevent, as far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize.

Hudson, 468 U.S. at 526 - 27, 104 S.Ct. at 3200. The Hudson Court stated further as follows:

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[18] *See Polk v. Montgomery County*, 782 F.2d 1196 1201 (4th Cir. 1986)(Whether detainee's strip search was "conducted in private . . . is especially relevant in determining whether [it was] reasonable under the circumstances.")

> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[l]oss of freedom of choice and privacy are inherent incidents of confinement." Bell v. Wolfish, 441 U.S., at 537, 99 S.Ct., at 1873.

Hudson, 468 U.S. at 527 - 28, 104 S.Ct. at 3201 (footnote omitted).

The Eighth Amendment works together with the Fourth Amendment to provide some limited additional protection. The Eighth Amendment protects prisoners from "cruel and unusual punishment" in the form of "unnecessary and wanton infliction of pain" at the hands of prison officials. Wilson v. Seiter, 501 U.S. 294, 297, 111 S.Ct. 2321, 2323, 115 L.Ed.2d 271 (1991); Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)(internal quotations omitted). Hudson v. McMillan, 503 U.S. 1, 8, 112 S.Ct. 995, 999 - 1000, 117 L.Ed.2d 156 (1992). To establish a violation of the Eighth Amendment based upon the conditions of confinement, an inmate must allege and prove (1) a "sufficiently serious" deprivation or risk of serious harm objectively and (2) that prison officials knowing of the deprivation or risk acted consciously with "deliberate indifference" to his health and safety subjectively. Wilson v. Seiter, 501 U.S. at 297 - 98, 304, 111 S.Ct. at 2324. A condition of confinement is "sufficiently serious" if it is "incompatible with the evolving standards of decency that mark the progress of a maturing society . . . or involve the unnecessary or wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102 - 03, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976). Thus, Eighth Amendment violations occur only where there are extreme deprivations. Mere discomfort is

not actionable.

Recognizing a limited right to bodily privacy, the Fourth Circuit Court of Appeals stated in Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981), decided after the Supreme Court's decision in Bell v. Wolfish and before its decision in Hudson,[19] as follows:

> Persons in prison must surrender many rights of privacy which most people may claim in their private homes. Much of the life in prison is communal, and many prisoners must be housed in cells with openings through which they may be seen by guards. Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.

More recently, in Leverette v. Bell, 247 F.3d 160 (4th Cir. 2001), considering the Fourth Amendment right of privacy of an employee of a South Carolina correctional institution who was required to submit to a visual body cavity search by an associate warden, the Fourth Circuit looked for guidance to the Supreme Court's conclusion in Bell v. Wolfish, 441 U.S. at 560, 99 S.Ct. at 1885, stating as follows:

> Emphasizing the 'unique' security concerns present in the prison context, the Court concluded that, '[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates,' visual body cavity searches may be conducted on inmates on less than probable cause.
>
> The Court's decision in Bell v. Wolfish made clear that the 'unique security dangers' present in correctional facilities may justify even the most intrusive searches, and its conclusion also reflects, inter alia, the severely abridged privacy interests of

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[19] Courts have determined in reading *Bell v. Wolfish* and *Hudson* together that inmates have no right or reasonable expectation of privacy under the Fourth Amendment. *See Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995)(*Wolfish* assumed without deciding that prisoners retain some right of privacy under the fourth amendment. Five years later the Court held that they do not. *Hudson v. Palmer*, 468 U.S. 517, 526 - 30, 104 S.Ct. 3194, 3200 - 02, 82 L.Ed.2d 393 (1984), observes that privacy is the thing most surely extinguished by a judgment committing someone to prison.") The Fourth Circuit decided *Lee v. Downs* in the light of *Bell v. Wolfish* and without the benefit of the Supreme Court's reasoning in *Hudson*.

prisoners.

Thus, it appears that the Fourth Circuit follows and has expanded upon the reasoning of the Supreme Court in the context of strip searches to include prison employees as well.

Also in the wake of Bell v. Wolfish and Hudson, several Courts have found that strip searches of prisoners upon leaving and returning to a segregated unit is constitutionally permissible. Rickman v. Avaniti, 854 F.2d 327, 328 (9th Cir. 1988)(Prison policy requiring prisoners in segregation unit to submit to strip searches when leaving their cells for recreation, medical treatment, visitation and use of law library was found constitutional, and inmate's cell was a reasonable place to conduct the search.); Goff v. Nix, 803 F.2d 358, 370 - 71 (8th Cir. 1986), *cert. denied*, 484 U.S. 835, 108 S. Ct. 115, 98 L.Ed.2d 73 (1987)(Visual body cavity search of segregation unit inmates before and after going to exercise area to prevent passage of contraband constitutional.); Arruda v. Fair, 710 F.2d 886, 888 (1st Cir. 1983), *cert. denied*, 464 U.S. 999, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983)(Validating strip searches of inmates traveling from segregated housing unit to law library, infirmary or visitation room.); Campbell v. Miller, 787 F.2d 217, 228 (7th Cir 1986), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986)(Permitting visual body cavity searches of high security inmates being transported to law library.).

Several Courts have held that strip searches of prisoners in the presence of other inmates and staff are not constitutionally defective, especially in light of legitimate security concerns. Elliot v. Lynn, 38 F.3d 188 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 176 (1995)(Visual body cavity search conducted in presence of other inmates and correctional officers reasonable in view of legitimate security concerns.); Franklin v. Lockhart, 883 F.2d 654 (8th Cir. 1989)(Legitimate security concerns justified conducting strip searches of inmates in segregation in view of other inmates.); Michenfelder

v. Sumner, 860 F.2d 328 (9th Cir. 1988)(Strip searches conducted in hallway reasonable in view of legitimate security and safety considerations.).

Strip searches performed by or in front of members of the opposite sex do not necessarily violate the Fourth or the Eighth Amendment. Johnson v. Phelan, 69 F.3d 144, 146 - 51 (7th Cir. 1995)("Unless female guards are shuffled off to back office jobs, itself problematic under Title VII, they are bound to see the male prisoners in states of undress. Frequently. Deliberately. Otherwise, they are not doing their jobs."; Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985). When, however, they are performed by or in front of members of the opposite sex purely for purposes of harassment and without any legitimate penological need or purpose, they are violative of the Eighth Amendment. Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003)("There is no question that strip searches may be unpleasant, humiliating and embarrassing to prisoners, but not every psychological discomfort a prisoner endures amounts to a constitutional violation. For example, a strip search of a male prisoner in front of female officers, if conducted for a legitimate penological purpose, would fail to rise to a level of an Eighth Amendment violation."); Peckman v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998); Johnson v. Phelan, *supra*, 69 F.3d at 147.

Finally, in consideration of Plaintiff's claim that he is subject to bitterly cold temperatures in the strip search process, it is clear that failure to protect inmates from extreme cold can constitute an Eighth Amendment violation. Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) Chandler v. Baird, 926 F.2d 1057, 1064 - 65 (11th Cir. 1991); McCray v. Burrell, 516 F.2d 357, 365 - 68 (4th Cir. 1975)(Eighth Amendment violation found where inmate was solitarily confined for forty-six hours in a cold cell with no clothing or blankets, no running water or personal hygiene items and a toilet which consisted of a hole in the floor.) In assessing whether an alleged violation on the basis of

exposure to extreme cold is "substantially serious", Courts look to the duration of the exposure and the totality of the conditions contributing to the alleged deprivation including typically other circumstances causing hardship. *See* Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999).

Considering the reasonableness of the recreation yard strip searches about which Plaintiff complains pursuant to Bell v. Wolfish, Plaintiff is not complaining about their scope or the manner in which they are performed. Indeed, it is evident that they are no more or less intrusive in scope or manner than those found constitutional in many cases. Rather, Plaintiff's main focus in challenging the reasonableness of the searches is upon (1) the place where they are conducted, i.e., where they can be observed by other inmates, correctional officers not conducting the searches and female prison staff, and (2) the justification for conducting them there. The material facts are not in dispute. MOCC male correctional officers conduct routine strip searches of all Quilliams inmates when they go to and return from the recreation yard. They do so even when a Quilliams II inmate takes recreation alone. As inmates leave the recreation yard, they are strip searched in a cage or sally port at the entrance way to the recreation yard which separates them from other inmates on the yard. Though the view is blocked to some extent by the male correctional officers who stand in front of the entrance way to the recreation yard and the frame and hardware of the doorway, female correctional officers and staff can see the inmates being strip searched but do not participate, and any viewing by them is "purely incidental and *de minimis*." Plaintiff has cited no specific instance when he was observed being strip searched by female officers or staff.

For justification for conducting the strip searches in the sally port before inmates are escorted from the recreation yard back to their cells, Defendants state that the strip searches are required to prevent the passage of contraband, particularly weapons, among the Quilliams inmates as they are

released together on the recreation yard. They state that Quilliams II inmates are in segregation for misconduct, often violent misconduct, at MOCC and hence are dangerous. As to Plaintiff, they submit evidence that he has been designated to Quilliams II for engaging in fights with other inmates using a homemade knife in one fight. They attach as Exhibit J to their Memorandum in Support of their Motion for Summary Judgment (Document No. 44) copies of numerous notes which Plaintiff has sent along to prison staff clearly indicating his disdain for them. Plaintiff makes no cognizable assertion that the strip searches are conducted for any other reason than concern for institutional security and safety. There is no evidence and no inference can be drawn from the facts that the searches are conducted to harass, humiliate or punish the Quilliams inmates and Plaintiff in particular. The Defendants' stated justification for conducting the strip searches where they do is therefore substantially supported by the evidence. Accordingly, the undersigned finds in view of the case law cited above that the strip searches conducted as inmates leave the recreation yard where they might be incidentally observed by other inmates, male and female correctional officers and female staff members are reasonable and not motivated by punitive intent. The strip searches are not private, but the record reflects that the manner in which they are conducted affords Quilliams inmates as much privacy as reasonably possible under the circumstances.[20] Specifically with respect to Plaintiff, in view of his propensity for violent misconduct and obvious contempt for prison administrators and staff, the routine strip searches are clearly reasonable. They are no less reasonable or justifiable when he has been on the recreation yard by himself. Indeed, such strip searches are

[20] The record reflects that MOCC makes recreation available to over 200 Quilliams inmates for one hour a day five days a week. This is obviously a major undertaking and requires a great deal of staff time and supervision. Conducting strip searches of inmates as they leave the recreation yard appears to be an efficient way of processing so many inmates through recreation and at the same time attending to serious concerns about institutional security and safety.

more private and less demeaning or humiliating insofar as other inmates are not there to observe them. Though it may appear to be a belt and suspenders approach to administering institutional security and safety, Courts have made it quite clear that they will not interfere with policies and practices adopted in prison administration in the interest of institutional security and safety. Recreation yard strip searches therefore do not violate the Fourth Amendment.

Likewise, no violation of the Eighth Amendment is evident either by virtue of the opportunity for female staff to observe the recreation yard strip searches or Plaintiff's exposure to cold in the winter months. The undisputed material facts do not indicate the occurrence of a "sufficiently serious" deprivation or risk of serious harm objectively. The facts and circumstances do not implicate the sort of extreme deprivation which will support an Eighth Amendment claim. Female staff have only the ability to view the recreation yard strip searches incidentally, and Plaintiff can cite no specific time when he was observed by female staff. It is further evident that Plaintiff's exposure to cold temperatures while being strip searched in the winter months is short in duration, and, while Plaintiff states that it is painful, he has testified that he has suffered no physical consequences. The circumstances alleged by Plaintiff and evident from the record are in no way nearly as severe as those which the Court considered to violate the Eighth Amendment in McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975). Plaintiff may indeed find it humiliating and degrading to submit to strip searches which might be viewed by chance by female staff and he no doubt finds it uncomfortable to stand naked in the cold for between 30 seconds and a minute while he is strip searched. Nevertheless, the Eighth Amendment does not protect against the violation of Plaintiff's sensibilities. Rather, it protects against conditions of confinement which are objectively inhumane. Inhumane conditions are not evident here.

Accordingly, the undersigned finds that the facts viewed in the light most favorable to the Plaintiff do not establish a deprivation of Plaintiff's rights under the Fourth and the Eighth Amendments. Therefore, the Defendants' qualified immunity defense is meritorious, and they are entitled to summary judgment.

Plaintiff is not entitled to judgment on the pleadings respecting his claim that strip searching him when he takes recreation alone violates his Fourth and Eighth Amendment rights because, considering only the pleadings and attachments, it cannot be said to be beyond doubt that the Defendants can plead no facts that would support his claim for relief. Considering his Motion for Judgment on the Pleadings a Motion for Summary Judgment as Rule 12(c) permits and taking into account all of the evidence of record, it cannot be said that his claims are supported by the material facts and he is entitled to judgment as a matter of law. Accordingly, Plaintiff's Motion for Judgment on the Pleadings must be denied.

Having thoroughly examined the record in this case and considered the applicable law, the undersigned hereby respectfully **PROPOSES** that the District Court confirm and accept the foregoing findings and **RECOMMENDS** that the District Court **GRANT** Plaintiff's Motion to Dismiss the Complaint against Defendant Michael Coleman (Document No. 37.) and the Motion of Thomas McBride and Robert Daniel to Deny Class Certification (Document No. 38.), **DENY** Plaintiff's Motion for Judgment on the Pleadings (Document No. 41.) and **GRANT** Defendants' Motion for Summary Judgment (Document No. 43.).

The parties are hereby notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge Charles H. Haden. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule

6(e) and 72(b), Federal Rules of Civil Procedure, the parties shall have thirteen days from the date of filing of this Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841,846 (4th Cir. 1985); United States v. Schonce, 727 F.2d 91,94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Haden and this Magistrate Judge.

The Clerk is hereby requested to send a copy of this Order to counsel of record and to Plaintiff who is acting *pro se.*

ENTER: July 31, 2003.

R. Clarke VanDervort
United States Magistrate Judge